Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of:

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities	))))	MM Docket No. 97-182

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

LOUISE H. RENNE
City Attorney

Julia M. C. Friedlander
Traci Bone
Ilene Dick
Jayne Lee
Deputy City Attorneys

1390 Market Street
Fifth Floor
San Francisco, CA 94102
Tel: (415) 554-4255

INTRODUCTION

The City and County of San Francisco (the City) submits these comments in response to the Commission's Notice of Proposed Rule Making (NPRM) regarding preemption of local zoning, land use and other laws affecting broadcast facilities.

The City has an immediate interest in the matters addressed by the NPRM. Several City departments are reviewing modifications to Sutro Tower (the Tower) that have been proposed in connection with launching digital broadcasting. These modifications involve hanging a 125-foot long steel beam from a height of more than seven hundred feet on a tower that stands within 250 feet of the nearest residence. The new beam and antennas together are expected to weigh more than twelve tons.

Reciting unsworn "facts" from an unidentified source, the Petition for Rulemaking filed by the National Association of Broadcasters (NAB) and the Association for Maximum Service Television (the Petition) describes the City's review of the Sutro Tower modifications as a "procedural nightmare." Petition at 10. The Petition's description of the City's activities is profoundly misleading: 1) it neglects to mention the public safety issues arising from the proposed modifications; 2) it neglects to mention the other public purposes served by the City's review; 3) it describes as City requirements procedures that were undertaken *voluntarily* by Sutro Tower, Inc.; and 4) it misstates the time City departments have taken to review the modifications.

The City's review of the proposed modifications to Sutro Tower has two simple objectives: 1) to protect the health and safety of residents; and 2) to ensure that structures in

San Francisco are consistent with the City's land use plans and policies. The City pursues these objectives by enforcing laws of general application that have been adopted under the City's police power and under the mandate of state law. The City has not required anything of Sutro Tower, Inc. that would not be required of any property owner seeking to undertake a construction project of similar scale that does not involve broadcast facilities.

Adoption of the Proposed Rule would immediately undermine the City's review of the Sutro Tower modifications, and the effects of the Proposed Rule would not end there. The Proposed Rule would give all broadcasters operating in San Francisco an extraordinary exemption from state and local laws of general application. In addition, the Proposed Rule would fundamentally transform the scheme of concurrent federal, state, and local jurisdiction that has governed the construction and siting of broadcast facilities for decades. Under specific statutory authority, federal agencies regulate broadcast facilities for specific purposes: to ensure that broadcast programming is available throughout the country, to ensure that signals generated by one Commission licensee do not interfere with the signals of other licensees, and to ensure that broadcast facilities do not pose a hazard to air navigation.

Under the plenary power reserved to the states by the Tenth Amendment, state and local laws and agencies govern the structural safety of broadcast facilities and their placement within communities in a manner consistent with state mandates and relevant land use plans and policies. In addition, state and local laws of general application govern other matters affecting broadcast facilities that fall well beyond the specific expertise of the Commission. These laws include, for example, taxation of property and the terms and conditions of employment for individuals employed in connection with broadcast facilities.

For decades, the Commission has recognized that state and local regulation of siting and construction of broadcast facilities serves public interests that are beyond the scope of the interests over which Congress has given the Commission authority. Federal, state and local review of the construction of broadcast facilities has thus run concurrently; each jurisdiction has recognized that no action may be taken until all required approvals are secured. For example, the Commission grants extensions for federal construction permits where circumstances beyond the control of the permittee, including problems securing local zoning approvals, delay construction plans. *See* 47 C.F.R. §73.3534(b).

There is no reason to disturb the scheme of concurrent jurisdiction today. Indeed, the circumstances described in the Petition make state and local review especially important. The Petition complains that the availability of only a handful of qualified tower construction crews will hinder broadcasters' ability to meet the Commission's deadlines for digital broadcast service. The Petition warns: "Construction resources will be stretched to their limits – *and possibly beyond* – in complying with the Commission's DTV build-out schedule." Petition at 9, emphasis added.[1] Rapid construction of immense structures – by crews stretched *beyond* their limits – can pose serious public safety hazards and make a permanent impact on the landscape and environment. This is no time to cut corners on review of structural safety and land use issues.

The City and County urges the Commission to abandon the Proposed Rule's extraordinary incursion into state and local police powers for the following reasons:

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[1] The collapse of a broadcast tower that killed three workers in Mississippi last week suggests that the Petition's ominous prediction may already be coming true. "Giant Miss. TV Tower Topples; 3 Men Die. *The Commercial Appeal* at B1 (Oct. 24, 1997).

1) The Proposed Rule would jeopardize public safety by imposing deadlines for review of the safety of new and modified structures that would make conscientious analysis impossible;
2) The Proposed Rule would dramatically restructure the scheme of concurrent federal, state and local jurisdiction over broadcast facilities that has served the public interest for many decades;
3) The Proposed Rule would provide a windfall exemption from local laws for broadcast facilities that have no relation to the deployment of digital television and would undermine local control over community development;
4) The Proposed Rule would undermine the well-established doctrine of exhaustion of administrative remedies and turn the Commission into a national board of zoning appeals;
5) The Proposed Rule would raise serious constitutional concerns under the due process clause and the Tenth Amendment;
6) The Proposed Rule exceeds the scope of the Commission's Congressionally delegated authority over digital television and broadcast facilities;
7) The Proposed Rule would generate permit denials, Commission proceedings and litigation that could otherwise be avoided; and
8) Neither the NPRM nor the Petition establish any justification for the extraordinary intrusion into state and local authority embodied by the Proposed Rule.

BACKGROUND

1. Sutro Tower

Sutro Tower is a steel structure that stands 977 feet tall. The Tower is located on the east peak of Mount Sutro. Mount Sutro is one of the highest points in San Francisco and is

located near the center of the City. The Tower is located at approximately 834 feet above sea level. The peak of the Tower thus extends to 1811 feet above sea level. The Tower is the San Francisco Bay Area's tallest structure. On clear days the Tower can be seen from most points within the City and from many points around the Bay. Maltzer Declaration, ¶2.

Sutro Tower is surrounded by low density residential land uses. The adjacent neighborhoods consist primarily of single-family dwellings, small multi-family housing structures, and neighborhood commercial facilities. Other nearby land uses include a school, two reservoirs, the University of California at San Francisco Medical Center, open space and neighborhood recreation. The closest residence is located approximately 250 feet from the base of the Tower. The closest public roadway is approximately 150 feet from the base of the Tower. Maltzer Declaration, ¶3.

The Tower supports antennas for analog broadcasting by ten television stations and four FM radio stations. The City first issued a conditional use permit authorizing the construction of Sutro Tower in 1966. Construction of the Tower was completed in 1973. The Tower was built to comply with the 1969 San Francisco Municipal Building Code. Maltzer Declaration, ¶5. At the time, the Code required the Tower to meet wind-load standards based on wind speeds of 50 miles per hour. The current San Francisco Building Code requires structures to meet wind-load standards based on wind speeds of 70 miles per hour. Chew Declaration, ¶7. Electric service to Sutro Tower is currently supplied by two 12-kilovolt feeder lines. Each feeder line serves an on-site 1500 kilovoltam (KVA) electrical transformer. Maltzer Declaration, ¶5.

2. Sutro Tower Modifications

According to Sutro Tower, Inc., the installation of digital antennas on Sutro Tower will require the addition of a new steel beam that will be 125 feet long, 3 feet wide and 3 feet deep. This beam will be installed to hang between approximately 630 and 755 feet above ground level. Maltzer Declaration, ¶6. The additions to the Tower are expected to weigh more than twelve tons. Chew Declaration, ¶5. The addition of digital transmission facilities will also require installation of an additional transformer for each electric feeder line. Maltzer Declaration, ¶6.

On May 13, 1997, Sutro Tower, Inc. submitted an application for a building permit to reinforce the legs, haunches and diagonals that will support the new beam and digital antennas. Chew Declaration, ¶3. Sutro Tower, Inc. maintains that these structural upgrades would have been undertaken whether or not digital antennas were to be installed on the Tower.

3. City Review of Sutro Tower Modifications

To date, the City's review of proposed Sutro Tower modifications relating to the implementation of digital broadcasting has had three principal components. First, the City's Zoning Administrator responded to Sutro Tower Inc.'s request for an opinion about the scope of the conditional use permit originally granted in 1966. *See* Passmore Declaration, ¶2. Second, the Department of Planning has managed the preparation of an Environmental Impact Report (EIR) in accordance with the requirements of the California Environmental Quality Act (CEQA). *See* Maltzer Declaration, ¶¶ 8-10,12. Third, the Department of Building Inspection reviewed an application for a building permit for structural upgrades of

the Tower. *See* Chew Declaration, ¶3,6,9. Sutro Tower, Inc. asserts that it would have sought permits for this structural upgrade with or without the planned installation of digital broadcasting facilities. After the EIR is completed, a fourth review will be required: the City expects Sutro Tower, Inc. to submit a building permit application for installation of the steel beam that will support the new digital antennas.

Sutro Tower, Inc.'s oral request for a Zoning Administrator opinion was made in December, 1995. *See* Passmore Declaration, ¶2. Sutro Tower, Inc. did not inform Mr. Passmore that his opinion was needed in connection with any pending permit application or any particular timeline. Indeed, no application for any permit was pending at the time. Mr. Passmore responded to this request as a courtesy to clarify the record for future City decisions. Neither the application for environmental evaluation, which was filed nine months later, nor the application for a building permit, which was filed seventeen months later, was dependent on the Zoning Administrator's opinion in response to this request. Passmore Declaration, ¶4.

On July 12, 1996, prior to making any other specific requests of the City, representatives of Sutro Tower, Inc. met with several City department heads to brief them about the anticipated transition to digital television. At this meeting, Sutro Tower representatives distributed a document entitled "Sutro Tower ATV Implementation Plan" to city officials. *See* Passmore Declaration, ¶6 and Exhibit A thereto.

Sutro Tower was not able to meet the goals it set for itself in the ATV Implementation Plan. Although the ATV Implementation Plan proposed that a building permit application would be filed in September, 1996, Sutro Tower, Inc. did not in fact file a permit application

until May, 1997. *See* Chew Declaration, ¶3. Likewise, while the ATV Implementation Plan proposed to submit a preliminary draft EIR in September, 1996, Sutro Tower, Inc. did not file a preliminary draft EIR with the Planning Department until February, 1997. *See* Exhibit A to Maltzer Declaration. Indeed, although Sutro Tower initiated the environmental evaluation process in September, 1996, the Department of Planning was not given a draft to review until January 21, 1997. Maltzer Declaration, ¶14.

The City's review of the Sutro Tower modifications under CEQA is dictated by California law. At several stages in the environmental review process, the City's EIR coordinator, Paul Maltzer, recommended steps to maximize public education, to avoid potential challenge or litigation, and thus to expedite the statutorily required CEQA process. *See* Maltzer Declaration, ¶12. At each stage, Sutro Tower, Inc. did not object. Indeed, Sutro Tower, Inc. representatives have often noted that Sutro Tower, Inc. *volunteered* to take these steps. *See, e.g.*, Exhibit 2 at 27. Throughout the CEQA process, as more fully set forth in the Maltzer Declaration and Exhibit A thereto, most of the time that elapsed was consumed by procedures requiring action by Sutro Tower, Inc. and its consultants, not the City.

When Sutro Tower finally filed its first building permit application with the Department of Building Inspection in May, 1997, the documentation provided did not satisfy the current requirements of the San Francisco Building Code. *See* Chew Declaration, ¶¶3,4. As a result, the Department's engineer responsible for reviewing the application had to request more information. When the requested information was provided, the application was reviewed and approved expeditiously. *See* Chew Declaration ¶4.

The Petition's description of a 21-month "procedural nightmare" suggests that the City has subjected Sutro Tower, Inc. to irrational and obstructionist requirements. The record suggests a very different story. Under state and local law, the modifications proposed for Sutro Tower raise serious questions and trigger several kinds of public review reflecting important governmental purposes. The City has acted promptly to evaluate permit requests in a responsible fashion. Indeed, contrary to the implication of the Petition, during many stages of the review process, City officials were waiting to receive information from Sutro Tower, Inc. See Maltzer Declaration at ¶14 and Exhibit A, Chew Declaration at ¶4.

The City would see little reason to bring the details of its review of Sutro Tower modifications to the attention of the Commission. Indeed, the City commends Sutro Tower, Inc. for beginning early the process of educating the public and City officials about the transition to digital television, and its effects on what may be the most conspicuous structure in San Francisco. The Commission's proceeding regarding what is now called digital television has been underway since 1987.[2] Any broadcaster or tower owner who has failed to inform the public and local officials about the effects of the transition to digital television on major local facilities has, at best, neglected its duties as a corporate citizen.

However, given the Petition's reliance on misleading and unsworn "facts" about the activities of the City to justify broad and sweeping preemption of state and local governments

[2] The Commission has been regulating the move to advanced television (ATV), now digital television or "DTV" in formal proceedings since at least 1987. *See In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Notice of Inquiry*, MM Docket No. 87-268 RM-5811, FCC 87-246 (Aug. 20, 1987), 2 FCC Rcd 5125 (1987).

across the country, the City has been compelled to correct the record.[3] The Petition's presentation of "facts" is even at odds with the sentiments expressed to local Planning Department officials by the Vice President and General Manager of Sutro Tower. In a letter to Hillary Gitelman dated July 11, 1997, Eugene Zastrow commended the Planning Department for its expeditious review of the environmental impact report. *See* true and correct copy attached hereto as Exhibit 1.

Furthermore, in July 24, 1997 testimony urging immediate action by the City's Planning Commission, representatives of Sutro Tower, Inc. misstated the federally mandated "deadlines" motivating the proposed Sutro Tower modifications. Although the FCC's rules do not require *any* broadcaster to initiate digital broadcasting before May 1, 1999 (*See* 5th R&O at ¶76), Sutro Tower, Inc. informed the City's Planning Commission that federal mandates require three local broadcasters to begin digital broadcasts from Sutro Tower by November, 1998. *See* true and correct copy of transcript of public hearing testimony attached hereto as Exhibit 2, pp. 25-29. Contrary to these assertions, three San Francisco broadcasters *voluntarily* committed to an accelerated construction schedule. *See* 5th R & O at ¶76 and n. 164. These broadcasters could have asked the City to work with them as a partner in an effort to bring digital broadcasting to San Francisco consumers on an accelerated basis. Instead, the National Association of Broadcasters has chosen to misrepresent to the Commission the nature and record of the City's actions.

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[3] The Petition contains still more misrepresentations. Contrary to the Petition, the "RF Exposure technical report" was submitted to the City in January, 1997, not September, 1996. In addition, Sutro Tower Inc. *volunteered* to pay for an expert to review this report on behalf of the City's Health Department. The City did not require any such payment. Petition at 11, ¶3.

This record hardly supports the broad and deep incursions into state and local authority suggested by the NAB's Proposed Rule.

ARGUMENT

I. THE PROPOSED RULE WOULD BROADLY AND DEEPLY USURP STATE AND LOCAL POLICE POWER.

Taken as a whole, the Proposed Rule would make broad and deep intrusions into state and local police power. This section sets forth the major provisions of the Proposed Rule and the most immediate effects of each provision.

1. Local Action Deadlines. (Subsections (a) and (c))

The Proposed Rule would impose new deadlines on local governments by requiring local agencies to act on requests for authorization within a "reasonable period of time." Unlike Congress, which recognized that a reasonable period of time for review of a state or local permit requests may vary according to the circumstances, *see* §704 of the Telecommunications Act of 1996 and H. Rep. 104-458 at 208, the Proposed Rule would impose uniform national deadlines for state and local action. Depending on the nature of the proposal, state and local governments would be required to act within 21, 30 or 45 days. Since the proposed modifications to Sutro Tower will not change the overall height of the Tower, under the Proposed Rule, City officials would have only 21 days to review *any* related permit application. *See* Proposed Rule, subsection (a)(1).

The Local Action Deadlines present several problems. First, the Local Action Deadlines embodied in the proposed definition of a "reasonable period of time" are

completely unreasonable. As the City's review of the Sutro Tower modifications demonstrates, different kinds of permit applications involve varying degrees of analysis and discretion. In San Francisco, building permits may involve significant analysis but little discretion. Assuming that an application is complete and provides all necessary supporting documentation (which the application filed with the Building Inspection Department on May 13, 1997 did not), analysis of a building permit application may be possible in a relatively short time. However, it is not unusual for a building permit application to require several revisions before a complete analysis of code compliance can be performed. This analysis is directed solely at protecting the public health and safety.

In contrast to a building permit, a conditional use authorization and an environmental evaluation require a significant amount of analysis, *as well as a significant degree of discretion.* Furthermore under state and local law, conditional use authorizations and environmental evaluations both require action by the Planning Commission. According to state and local law, the Planning Commission must meet in public and provide significant advance notice of its actions to the public. These public notice and action requirements are designed to protect the due process rights of adjoining property owners and to ensure public access to governmental decision-making. If the Proposed Rule were adopted, California cities would not be able to comply with their obligations under the California Environmental Quality Act, various California statutes governing local land use planning, or California's open meeting laws.

Second, the Proposed Rule *would impose the Commission's priorities* on local officials. A city like San Francisco receives dozens, if not hundreds, of permit applications every day.

City officials must balance many competing interests in prioritizing staff time for review of these applications. As a result, even where a building permit application requires only eight hours of engineering analysis, it may take several weeks before a decision can be issued because other permit applications were filed earlier or must be given priority under local laws or policies.

The Proposed Rule would force local governments to give priority to broadcast applications even where other matters of greater importance require their attention. It is instructive to compare the Proposed Rule to Section 704 of the Telecommunications Act of 1996, on which the Proposed Rule was clearly modeled. Even Congress didn't believe it was in a position to dictate priorities to the local officials who are responsible for reviewing land use and permit applications. Regarding the siting of personal wireless facilities, the Conference Report explained:

> Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. *It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any by the generally applicable time frames for zoning decision.*

H. Rep. No. 458, 104th Congress, 2d Sess. 208 (1996)(emphasis added).

Given Congress' deference to local priorities, it is difficult to understand how the Commission – which exercises authority only over the narrow range of issues delegated to it by Congress – could make the judgment from Washington that the environmental review for a hazardous waste facility should take a backseat to the environmental review for a broadcast tower. Under recent Supreme Court precedents, this direction to local officials would

arguably violate the Tenth Amendment. *Printz v. United States*, 117 S.Ct. 2365 (1997) (The federal government may not commandeer state and local officials to administer or enforce federal regulatory programs.). A federal administrative agency with specialized jurisdiction should not purport to dictate priorities to local agencies that must exercise plenary power.

Finally, as a policy matter, the local action timelines are so unreasonable that they would achieve the opposite of their objective. When a local official is faced with a choice between approving a permit without conducting analysis, that is legally mandated or required by his or her professional judgment, or denying a permit application prior to the Local Action Deadline, many local officials would choose to deny the permit. In combination with the Proposed Rule's Alternative Dispute Resolution provision (subsection d), such denials would force the Commission to assume the duty now exercised by thousands of local building and planning officials to protect the public health, safety and welfare. This result would serve no articulable purpose.

2. Default Local Approval. (Subsection (a))

The Proposed Rule provides that the failure of a state or local government to act on any request by the relevant Local Action Deadline would result in the request being deemed approved. The Default Local Approval provision compounds the absurdity of the Local Action Deadlines. It is an axiom of land use law that the property interests of one property owner may be affected by governmental decisions regarding other properties. As a result, due process requires that potentially affected property owners receive notice and an opportunity to be heard in advance of governmental land use decisions. *Horn v. County of Ventura* (1979) 24 Cal. 3d 605. As a result, California courts have rejected as unconstitutional provisions of a

state statute that provided for automatic approval of land use applications without notice and a hearing to affected landowners. *Stephen R. Selinger v. City Council of the City of Redlands* (1989) 216 Cal. App. 3d 259. The Default Local Approval provision suffers from the same constitutional infirmity.

3. Evisceration of State and Local Land Use Authority. (Subsection (b))

Subsection (b)(2) of the Proposed Rule would preempt "*[a]ny* state or local land-use, building, or similar law, rule or regulation that *impairs the ability* of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities." Such state or local laws are saved from preemption only if "the promulgating authority can *demonstrate* that the action is *reasonable in relation to*": (1) "a clearly defined and expressly stated health or safety objective" excluding concerns regarding RF interference, RF Emissions, and FAA lighting, painting and marking requirements; *and* (2) the "federal interests" in (a) "allowing federally authorized broadcast operators to construct broadcast transmission facilities in order to render their service to the public"; *and* (b) "fair and effective competition among competing electronic media." This provision is shockingly broad. There are three major problems with the provision.

First, because *any* land use law or regulation could be said to *impair* a property owner's use of his or her property, this provision would completely eradicate traditional zoning considerations as bases for land use decisions about broadcast facilities. Only state and local laws *with a health or safety objective* are subject to the provision's (very narrow) "savings" clause. As a result, the land use policies and priorities set forth in the general plans of

localities across the nation, as well as the aesthetic interests expressed in many land use policies, *would be inapplicable to broadcast facilities.*

The effects of eliminating these bases for local decision are breathtaking. For example, if a broadcaster proposed to build a 900 foot tower on a vacant lot next to the San Francisco Museum of Modern Art, the New Main Library or even City Hall, City officials would be unable to reject the proposal on the grounds that the proposed use would be inconsistent with the existing land uses in the area, as set forth in the City's general plan. Likewise, the City would be unable to invoke land use policies adopted to preserve the City's skyline. Under the Proposed Rule, such aesthetic considerations would be deemed irrelevant.

Second, although the provision purports to preserve local authority to regulate the siting or construction of broadcast facilities based on health or safety objectives (aside from those explicitly placed beyond local reach), in fact, the provision undermines local authority to adopt and enforce even health and safety measures.

The Proposed Rule broadly preempts any state or local law that "impairs" the ability of a broadcaster to place, construct or modify broadcast facilities. Subsection (b)(2)(i) spares only those laws that survive a balancing test. Not only would the City have to demonstrate that its laws are reasonable in relation to "a clearly defined and expressly stated health or safety objective," but it would also have to demonstrate that its laws are reasonable in relation to the "*federal interests*" in allowing broadcasters to construct facilities and in "fair and effective competition among competing electronic media." For example, if a broadcaster proposed to build a new 900 foot tower in a densely populated residential area zoned for single family homes, even if the City could identify a health or safety basis for rejecting the

proposal, the City would also have to demonstrate that the City's regulations are reasonable in relation to the *"federal interests"* promoting placement of broadcast facilities. Thus, even the City's ability to protect the health and safety of its citizens, its most important role, could be outweighed by the federal interest.

Third, the Proposed Rule effectively prescribes that no state or local government can enact any police power measure of general applicability -- or apply any such measure to a broadcast facility – without taking into account the asserted federal interests. This commandeering of local decision-makers raises serious concerns under the Tenth Amendment.

4. New Standard of Review (Subsection (b)(2))

The Proposed Rule would revise the constitutional standard for review of state and local legislation. Under the Proposed Rule, the promulgating authority must demonstrate that its health and safety laws are reasonably related to "a clearly defined and expressly stated health or safety objective" or suffer preemption.

The Proposed Rule narrows the deference accorded to state and local legislation in two ways. First, it requires state and local laws to be reasonably related to *an articulated purpose*. Under clearly established Constitutional principles, courts inquire only whether legislation is rationally related to any "*conceivable*" legitimate state purpose. *See Railroad Retirement Board v. Fritz*, 449 U.S. 166, 178 (1980) ("It is, of course constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.").

Second, the Proposed Rule requires *the promulgating authority* to demonstrate that a state or local law is valid. Under clearly established constitutional principles, the burden is on a challenger to demonstrate that a law is invalid. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

The Proposed Rule would shift this burden from the contesting party to the state or local government.

5. Unauthorized Remedial Power. (Subsection (d))

The Proposed Rule establishes an "Alternative Dispute Resolution" (ADR) procedure whereby an applicant denied approval to place, construct, or modify a broadcast transmission facility may request an ADR process administered by the Commission. If the local action does not meet the standards prescribed in subsection (b)(2) of the Proposed Rule, "the Commission shall issue an order vacating the decision of the state or local government . . . and granting the applicant's request to place, construct, or modify its broadcast antenna facility."

This provision is fatally flawed for several reasons. First, the Commission has no statutory authority to establish itself as the administrator of an ADR process for broadcasters' complaints about facility-siting. If Congress had intended the Commission to exercise such authority, it would have granted it such authority in the Communications Act. In adopting the Telecommunications Act of 1996, Congress established an arbitration procedure for interconnection disputes in which state commissions are authorized to administer the arbitrations. 47 U.S.C. § 252(b). Congressional silence about disputes over siting and construction of broadcast facilities cannot be construed as a grant of authority to the Commission.

Second, the Commission has no jurisdiction to "vacate" a decision of a state or local government. Such power is reserved to the Courts. Any such effort by the Commission would violate the constitutional principle of separation of powers. Third, the Commission has no jurisdictional or statutory authority to issue zoning variances, building permits, or any

of the other remedies which would be required to grant an applicant's request. These powers are reserved to state and local government by the Tenth Amendment.

6. Elimination of Exhaustion Doctrine. (Subsection (d))

The ADR provision of the Proposed Rule would allow a broadcaster to initiate the ADR process without exhausting administrative remedies at the local level. For example, an applicant receiving a negative decision from a local zoning board could seek relief from the Commission while its independent appeal to the local zoning board of appeals is pending. The Commission, whose own rules require administrative exhaustion, should appreciate the need for such a doctrine. *See* 47 C.F.R. §1.115(k) (A party cannot appeal the decision of a Commission bureau chief to a court without first seeking full Commission review.) Without an exhaustion requirement, the Commission would risk ruling on a "decision" that isn't even final at the local level. In many jurisdictions, including San Francisco, this would remove final decision authority from elected officials.

7. Facility Overbreadth. (Subsection (f)(i))

Subsection (f)(i) of the Proposed Rule defines the term "broadcast transmission facilities" very broadly. As the Commission has noted, the Proposed Rule would affect all broadcast facilities – including radio facilities – not just facilities related to digital television. In addition, under the proposed definition, a building in downtown San Francisco housing television studios or a broadcaster's offices would be subject to the Proposed Rule. As a result, state and local police powers would be undermined even with respect to these facilities. Furthermore, a fiber optic line under San Francisco streets that connects a downtown broadcast studio with Sutro Tower would be subject to the Proposed Rule. The breadth of

this definition extends the effects of the Proposed Rule far beyond the scope of any justification that has been presented to the Commission.

8. RF Emission Compliance Preemption. (Subsection (b)(1)(i))

Subsection (b)(1)(i) of the Proposed Rule would prevent local officials from establishing any measures to ensure that broadcast facilities comply with the Commission's standards for human exposure to RF emissions. As described in the attached declaration of Richard Lee, because of its unique physical characteristics and surroundings, hot spots have been observed *at ground level* in the Sutro Tower area. The Commission's RF compliance program does not ensure that such hot spots do not endanger the public health or safety. As a result, it would be irresponsible to prevent local officials from monitoring compliance with the Commission's RF exposure standards.

II. THE PROPOSED RULE EXCEEDS THE SCOPE OF THE COMMISSION'S CONGRESSIONALLY DELEGATED AUTHORITY.

A. The Commission May Not Preempt State Or Local Police Powers Over Broadcast Facilities Without Congressional Authority

Subject to a narrow exception, the Proposed Rule would preempts the entire array of state and local police powers regulating zoning, land-use, building, or similar laws that "impair the ability" of broadcasters to place, construct or modify transmission facilities.[4] The NPRM reasons that such laws may obstruct federal policy by presenting an obstacle to the rapid

[4] Such state or local laws are saved from preemption only if "the promulgating authority can *demonstrate* that the action is *reasonable in relation to*": (1) "a clearly defined and expressly stated health or safety objective" excluding concerns regarding RF interference, RF Emissions, and FAA lighting, painting and marking requirements; *and* (2) the "federal interests" in (a) "allowing federally authorized broadcast operators to construct broadcast facilities in order to render their service to the public"; *and* (b) "fair and effective competition among competing electronic media."

implementation of digital television (DTV) service or to "the institution and improvement of radio and television broadcast service generally." NPRM, ¶ 1.

However, the NPRM ignores, well-settled law: the Supreme Court has uniformly held that the Commission can preempt state or local laws *only* when it is acting within the scope of its Congressionally delegated authority. *Louisiana Public Service Comm'n v. F.C.C.*, 472 U.S. 355, 374 (1986); *see also City of New York v. FCC*, 486 U.S. 57, 64 (1988). An agency "literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State," unless Congress has conferred power upon it. *Louisiana Public Service Comm'n*, 476 U.S. at 374. Thus, the appropriate inquiry is not whether the Commission believes that state and local police powers present an obstacle to federal policies, but whether *Congress* itself holds that view and has granted the Commission authority to preempt state and local regulation of the siting and construction of broadcast facilities.

Contrary to the argument of the Petitioners, no decision of the Supreme Court has ever held, or even intimated, that the Commission may categorically preempt all state or local laws that it believes may obstruct federal policy, absent Congressional authority. In *City of New York v. FCC*, 486 U.S. 57 (1988), on which Petitioners rely, the Supreme Court found that, in enacting the Cable Communications Policy Act of 1984, Congress expressly authorized the Commission to formulate technical standards for cable television facilities and equipment. *Id.* at 67. Thus, duplicate local regulations that conflicted with the federal regulations were preempted. *Id.* at 70. Here, the Commission lacks any comparable express authorization to regulate the siting and construction of broadcast facilities.

B. The Commission Must Meet The Heavy Burden Of Establishing That Congress Intended To Grant The Authority To Preempt

The Supreme Court has uniformly imposed a heavy burden on a party asserting authority to preempt state and local police powers. The Court has stated that the strong presumption against preemption of state and local police powers may be overcome only by "*clear and manifest*" congressional intent to the contrary. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516; (1992) Congress must be "*unmistakably clear* in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991) (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)) (emphasis added). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The presumption against preemption is strongest where, as in this case, preemption would displace the traditional police powers of state and local governments. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516; (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). No traditional police power is more fundamental to state and local governments than the power to enact, maintain, and enforce state and local zoning, land use, and building laws. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 509 n.18 (1975) ("Zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities."); *Queenside Hills Realty Co., Inc. v. Saxl*, 328 U.S. 80, 82 (1946) ("Protection of the safety of persons [through building ordinance] is one of the traditional uses of the police power of the States."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (Zoning considered traditional exercise of police power.).

C. Neither the Communications Act Nor The Balanced Budget Act Authorize the Commission To Preempt State and Local Police Power Over the Siting and Construction of Broadcast Facilities

The NPRM cites provisions of the Communications Act and the Balanced Budget Act to support its assertion of authority to preempt traditional state and local police powers over the siting and construction of broadcast facilities. Neither Act demonstrates express or implied Congressional intent to preempt state and local police power over the siting and construction of broadcast facilities.

1. The Communications Act Does Not Expressly or Impliedly Authorize the Commission to Preempt State and Local Police Power Over the Siting and Construction of Broadcast Facilities

The Communications Act provides for the creation of the Commission and delegates to it authority to regulate "interstate and foreign commerce in communications by wire and radio." 47 U.S.C. §151. Specific provisions of the Act grant the Commission a variety of powers regarding broadcast facilities. For example, the Commission issues station licenses and construction permits to broadcasters to regulate broadcaster qualifications and to prevent interference among licensed facilities. 47 U.S.C. §307. As Petitioners acknowledge, the provisions of the Act enumerating the Commission's powers over broadcast facilities do not expressly grant any authority to preempt state and local police power over the siting and construction of broadcast facilities. Petition at 20.

Several sections of the Act expressly preempt state and local authority on a variety of issues. For example, the Act preempts state laws regulating the prices charged by, or market entry of, commercial mobile radio service providers. 47 U.S.C. § 332(c)(3). The Act gives the Commission authority to preempt decisions regarding the siting of personal wireless service

facilities if they are improperly based on RF emission concerns. 47 U.S.C. §332(c)(7)(B)(iv). Thus, when Congress intends to preempt state and local law, it clearly and manifestly expresses its intent to do so.

It is a basic canon of statutory construction that when Congress includes a preemptive provision in a statute, silence about preemptive intent in other areas of the statute implies that these areas are not preempted. Because Congress did not, in the Communications Act, express any intent to preempt state and local regulation over the siting and construction of broadcast facilities, no such intent may be implied. *See Cipollone*, 505 U.S. at 517; *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483, 1488 (1995).

In the absence of any express statutory authority, the NPRM first relies on provisions of the Act setting forth the Commission's general purposes to support its assertion that preemption of local authority over the siting and construction of broadcast facilities falls "within the scope of our delegated authority." NPRM, ¶ 12.[5] However, the Supreme Court has uniformly refused to infer preemptive congressional intent from such "general statements." *See, e.g., Pacific Gas & Electric Co. v. State Energy Comm'n*, 461 U.S. 190, 222-23 (1983); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981).

The NPRM next suggests that the Commission's authority to preempt may be found in Section 201 of the Telecommunications Act of 1996 (1996 Act), which requires the Commission to condition DTV licenses on eventual return of analog spectrum. NPRM, ¶¶ 13 and 14; 47 U.S.C. § 336(c). The NPRM asserts that the Commission must preempt local

[5] The NPRM cites the *City of New York* and *Louisiana Public Service Comm'n.* cases discussed above but fails to expressly state any statutory authority for the assertion that such preemptive power is "within the scope of our delegated authority." NPRM, ¶ 12.